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No. 91-1481

In The

Supreme Court of the United States

October Term, 1991

HELEN EHRET BACH, EUGENE G. BACH, III and JANET B. LASHLEY,

Petitioners,

versus

TRIDENT STEAMSHIP COMPANY, INC., KAISER ALUMINUM AND CHEMICAL CORPORATION AND THE VESSEL, THE JAYMAT TRIDENT,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

MOTION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE AND BRIEF OF THE AMICUS CURIAE AMERICAN TRIAL LAWYERS ASSOCIATION AND LOUISIANA TRIAL LAWYERS ASSOCIATION IN SUPPORT OF PETITIONERS

NEBLETT, BEARD & ARSENAULT
RICHARD J. ARSENAULT
Post Office Box 1190
Alexandria, LA 71309-1190
Telephone: (318) 487-9874
Bar Roll Number 2563
Counsel of Record for Amicus Curiae (ATLA, LTLA)

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QUESTION PRESENTED FOR REVIEW

Should pilots now suddenly be denied seaman status despite their having been accorded that status since before the Jones Act's enactment?

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NOW INTO COURT, through undersigned counsel, comes the American Trial Lawyers Association and Louisiana Trial Lawyers Association, who respectfully represent that they have an interest in whether writs are granted in the matter at bar. The Trial Lawyers submit that their amicus curiae brief would be of value to the court and accordingly move for leave to file same. As of this filing date the defendant in this matter, Trident Steamship Company, Inc. through their attorney Robert

H. Murphy, has not yet consented in writing to the filing of this brief.

Respectfully submitted,

NEBLETT, BEARD & ARSENAULT
Attorneys at Law
Post Office Box 1190
Alexandria, LA 71309-1190
Telephone: (318) 487-9874

By: _____
RICHARD J. ARSENAULT
Bar Roll Number 2563

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INTEREST OF AMICUS CURIAE

The American Trial Lawyers Association and the Louisiana Trial Lawyers Association (hereinafter collectively referred to as "Trial Lawyers") are composed of over 62,000 lawyers engaged in litigation practice.

This amicus curiae brief, presented on behalf of both organizations, supports the position of petitioner.

The purpose of this brief is to convince this Honorable Court that compulsory pilots are quintessential seamen and fall exactly within the class of traditional maritime workers for whom the Jones Act, 46 U.S.C. 688, was designed.

SUMMARY OF ARGUMENT

(A SAILOR IS ALWAYS A SEAMAN BUT A SEAMAN IS NOT ALWAYS A SAILOR)

This case involves the specific question of whether a compulsory pilot is a seaman under the Jones Act. The Trial Lawyers support petitioner's position that since pilots were considered seamen at the time of the Jones Act's enactment, they still maintain that status today.

For traditional seamen, status is essentially a qualitative rather than a quantitative question. The *Robison*[1] test was not designed to identify traditional "blue water" seamen. Instead, it provides an analytical tool used most frequently in the context of employees engaged in offshore oil and gas production. These offshore workers are

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[1] *Offshore Co. v. Robison*, 266 F.2d 769 (5th Cir. 1959)

exposed to both the perils of the sea, and hazards associated with amphibious industrial employment. The *Robison* test, which embodies the concept of "brown water seamen", was specifically designed to identify these nouveau seamen. The Trial Lawyers urge this Honorable Court to recognize that there exist certain classes of maritime employment, such as pilots, whose occupations are so "salty" that persons engaged in those occupations are "seamen per-se".

ARGUMENT

For time out of memory mariners have gone to sea in ships risking life and limb to carry trade between nations. They rely on a special class of mariner to guide them past treacherous reefs, shoals, and rocks that lie between the open sea and their port of destination. This class of mariner is the local pilot.

By ancient right, pilots were considered mariners.[2] This venerable tradition was carried forward into American Admiralty law as this Honorable Court had occasion to note in *McDermott International Inc. v. Wilander,* 498 U.S. ___, 111 S.Ct. 807 at 811, 812, 112 L.Ed.2d 866 (1991).

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[2] Laws of Wisbuy; Rules of Oleron. Peters, Admiralty Decisions in the District Court of the United States for the Pennsylvania District (1807), Appendix to Vol.1

In fact, pilots were considered seamen under the general maritime law when Congress passed the Jones Act.[3]

The term "seaman" in the Jones Act is undefined. The Courts, therefore looked to the existing general maritime law for guidance. Therefore, as pilots were seamen before the Jones Act, afortiori they are seamen under the Jones Act.

Further evidence that pilots are seamen can be gleaned from Congressional regulations concerning pilots. These laws are found in Title 46 dealing with shipping and, in fact, come under Title II *Vessels and Seamen,* Part F "**Manning of Vessels**". Clearly, the implication is that Congress considers pilots to be seamen.

This position has been addressed by petitioner and in the interest of avoiding a "me too" brief, the Trial Lawyers instead will focus on another compelling rationale which also supports affording seaman status to compulsory pilots.

In *Bach v. Trident Steamships Company, Inc.*, 920 F.2d 322 (5th Cir. 1991), Judge Brown's persuasive dissent focuses on the historical precedent for a pilot being a seaman. Both the majority and Judge Brown, however, make an assumption about the analytical framework of determining seaman status for traditional seamen, to wit – that the "*Robison*" test is the determinative starting

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[3] *The China,* 74 U.S. 53 (1868); *Steamship Company v. Joliffe,* 69 U.S. 450 (1864); *Cooley v. Board of Wardens, The Port of Philadelphia,* 53 U.S. (12 HOW) 299 (1852); *The Mary Elizabeth,* 24 Fed.397 (CC SD ALA 1885); *The Lud Keefer,* 51 Fed.44 (3 CCA 1892)

point. The dissent in *Bach* would make an "exception" to the *Robison* test. The real problem however is in applying the analytical framework of *Robison* to traditional seamen, i.e. using a brown water test to identify blue water seamen.

This Honorable Court, in *Wilander*, supra, pointed to a conceptualization of seamen status that embraces personnel such as compulsory pilots. The result reached by applying *Robison* to the traditional seaman in the instant case, together with this Court's guidance in *Wilander*, confirms the inapplicability of *Robison* to those who are employed in traditional maritime occupations.

Wilander meticulously traced the origin of the term "seaman" in American Admiralty law. Noted with approval was Justice Story's pronouncement in *U.S. v. Thompson*, 28 F.Cas. 102 (C.C.D. Mass. 1832) that

> "a cook and steward are seamen in the sense of the maritime law, although they have peculiar duties assigned to them. So a pilot, a surgeon, a ship carpenter, and a boatswain are deemed seamen, entitled to sue in the admiralty."

Wilander, supra at 811.

Further, this Court found that in the 19th Century, the preeminent admiralty treatise had concluded that a seaman did not have to aid in navigation and quoted the distillation by that treatise as follows:

> "the term mariner includes all persons employed on board ships and vessels during the voyage to assist in their navigation and preservation, or to promote the purposes of the voyage."

Wilander at 812 citing E. Benedict, the American Admiralty, Section 278, p.158 (1850).

This Honorable Court further quoted Benedict in the following passage,

> ". . . . all the persons who have been necessarily or properly employed in a vessel as co-labourers to the great purpose of the voyage, have, by the law, been clothed with the legal rights of mariners – no matter what might be their sex, character, station, or profession."
>
> *Wilander* at 812.

Though *Wilander* was primarily concerned with whether the aid in navigation test was still required, important guidance is nevertheless provided as to general principles on seaman status. This Court stated that:

> "[W]e believe it settled at the time of *The Osceola* and the passage of the Jones Act that general maritime law did not require that a seaman aid in navigation. It was only necessary that a person be employed on board a vessel in furtherance of its purpose. We conclude therefore that, at the time of its passage, the Jones Act established no requirement that a seaman aid in navigation."
>
> *Wilander* at 813.

And when addressing the relationship of a master or member of the crew under the Longshore and Harbor Workers Compensation Act 33, Section 901 et seq. and seaman under the Jones Act, this Court stated:

> "We believe that the better rule is to define "master or member of the crew" under the LHWCA, and therefore "seaman" under the

> Jones Act, solely in terms of the employees connection to a vessel in navigation. This rule best explains our case law, and is consistent with the pre-Jones Act interpretation of "seaman" and Congress' land/based/sea/based distinction. All who work at sea in the service of the ship face those particular perils to which the protection of maritime law, statutory as well as decisional, is directed. [Citations omitted] It is not the employee's particular job that is determinative, but the employee's connection to a vessel."
>
> *Wilander* at 817.

And finally, in announcing the actual rule in *Wilander* the Court stated

> "The key to seaman status is employment related connection to a vessel in navigation. . . . in this regard we believe the requirement that an employee's duties must "contribut[e] to the function of the vessel or to the accomplishment of its mission" captures well an important requirement of seaman status. It is not necessary that a seaman aid in navigation or contribute to the transportation of the vessel, but a seaman must be doing the ship's work."
>
> *Wilander* at 817.

These passages from *Wilander* illustrate the essential characteristics necessary for seaman status i.e. an "employment related" connection to the vessel in doing the ship's work. Pilots unquestionably enjoy this relationship and therefore are seamen under the mandate of *Wilander*.

ROBISON'S ORIGINS DEMONSTRATE THAT IT WAS NOT DESIGNED FOR TRADITIONAL SEAMEN

While *Robison* grappled with attempting to delineate the boundaries of seaman status, it looked to a series of cases by this Honorable Court and lower Courts including *South Chicago Coal and Dock Company v. Bassett*, 309 U.S. 251 (1940); *Summerlin v. Massman Construction Company*, 199 F.2d 715 (4th Cir. 1952); *Wilkes v. Mississippi River Sand and Gravel Company*, 202 F.2d 775 (6th Cir. 1953); *Gahagan Construction Corp. v. Armao*, 165 F.2d 301 (1st Cir. 1948); and *Texas Company v. Gianfala*, 222 F.2d 382 (5th Cir.), rev'd 350 U.S. 879 (1955). In each of these cases, seaman status was found despite the fact that the claimants were not performing traditional seaman's functions. This observation made in *Robison* confirms the Court was considering non-traditional seamen. A further clue is left when the Court noted that the "key case in the conversion of offshore oilfield workers into seamen" was *Gianfala, Robison* 774. Clearly, *Robison* was dealing with and fashioning a test for non-traditional seamen, to wit- offshore oilfield workers.

ROBISON WAS DESIGNED FOR BROWN WATER SEAMEN

The *Robison* court recognized that in extending the protection of seaman status to "brown water" seamen, it was doing so because the brown water seamen shared the same marine risks that blue water sailors were exposed to. *Robison* at 780. The expansion of seaman status was consistent with the liberal construction of the Jones Act and consistent with its purpose. *Robison* at 780.

The Court also noted that the legislative history of the Jones Act contained no indication that Congress intended to limit the law to only conventional members of a ship's company. The implicit conclusion, of course, is that it always applies to conventional members of the ship's company. The absence of any legislative restriction permitted the concept of seaman status to evolve and accommodate unconventional vessels such as those used in the oil industry. *Robison* at 780. *Robison* was specifically designed to define the crew of these unconventional vessels.

THE WORD "CREW" DOES NOT HAVE A SINGLE MEANING

While traditionally the term crew does not have "an absolutely unvarying, legal significance", there are certain classes of employment that are so maritime in character that those engaged in that employment are always seamen. (See *Bassett*, supra.) These classes of employment are those that were consistently recognized as seamen in the general maritime law prior to the enactment of the Jones Act. For example, an illustrative list of those classes were identified by Justice Story while sitting as a circuit judge in *United States v. Thompson*, supra. As noted earlier, Justice Story declared that a cook, steward, surgeon, ship carpenter, boatswain and pilot were deemed seamen entitled to sue in admiralty. While recognizing that this is only an illustrative, and by no means exhaustive list, these employees were clearly considered to be seamen

prior to the Jones Act's enactment. The common denominator that these occupations have is that they are traditional blue water employees. These are the personnel that traditional admiralty law had in mind when it declared that seamen are wards of the Court. To subject these mariners to the same test used in identifying hybrid (brown water seamen) is inconsistent with traditional maritime law concepts. Furthermore, this was never the intent or the purpose of *Robison*.

THE TERM "SEAMEN" HAS TWO MEANINGS

As used in the maritime law of this country, there are effectively two meanings to the word "seamen". In its traditional and classical sense, the word "seamen" encompasses blue water sailors. However, when used in the context of the Jones Act, the term "seamen" identifies a larger group of individuals including employees that also face the same or greater risks than blue water sailors encounter. Offshore petroleum workers, for example, run all the risks attendant, incident, and inherent to oil drilling and exploration in addition to the standard perils of the sea. Such workers are seamen under the Jones Act, *Robison* at 780.

CONCLUSION

Robison was not designed to and therefore has limited efficacy in identifying blue water seamen. How then do we determine seaman status for persons engaged in traditional blue water occupations. Perhaps the "obscenity"

analogy is appropriate; the term "seaman" is difficult to define however, at least with regard to traditional mariners, we can easily recognize one when we see one.

Traditional blue water employees, by their very nature, meet the requirement expressed in *Wilander* for "doing the ship's work" in that they are contributing to the function of the vessel as well as the accomplishment of its mission. They are indisputably doing the work of the vessel and are therefore always seamen vis a vis whichever vessel or group of vessels they happen to be performing these duties on or for. They are, in effect, "seamen per-se". Such a designation for traditional blue water seamen would promote a logical policy rationale consistent with the purpose of the Jones Act, which is to make recovery on the part of employees in these hazardous marine industries easier to prove than in the usual civil tort case. *Thornton v. Gulf Fleet Marine Corp.*, 752 F.2d 1074, 1076 (5th Cir. 1985). Furthermore, the fact that the Jones Act has always been liberally construed likewise compels a finding that pilots clearly are and deserve seaman status. *Robison*, supra.

Respectfully submitted,

NEBLETT, BEARD & ARSENAULT
RICHARD J. ARSENAULT
Post Office Box 1190
Alexandria, LA 71309-1190
Telephone: (318) 487-9874
BAR ROLL NUMBER 2563
Counsel of Record for
Amicus Curiae (ATLA, LTLA)